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EMPLOYMENT IN INTERSTATE COMMERCE EMBRACING EMPLOYES REPAIRING BRIDGES.

Pedersen v. Delaware, Lackawanna & Western Railroad Co., 33 Sup. Ct. ——, decided May 26, 1913, seems to embrace the conclusion that about every servant of a common carrier engaged in interstate transportation may recover for any injury suffered by him, in the course of employment, through negligence of his employer, under the Federal Employers' Liability Act, whether such negligence be in performance of an intrastate act not regulated by Congress or not.

This is not merely our conclusion, but in stating it we thus interpret the dissenting opinion of Mr. Justice Lamar, who speaks also for Justices Holmes and Lurton. The Circuit Court ruled, that "an injury resulting from the negligence of a co-employee engaged in intrastate commerce was not within the terms of the Federal act and the (Third) Circuit Court of Appeals, though disapproving that ruling, held that under the evidence it could not be said that the plaintiff was employed in interstate commerce and therefore he was not entitled to recover under the act."

The majority opinion of the Supreme Court expresses its concurrence in this disapproval, but reverses the Circuit Court of Appeals in holding that the plaintiff was not at the time of his injury employed in interstate commerce. The dissenting opinion agrees *in toto*, with the view of the Circuit Court of Appeals.

Thus there is unanimity on the proposition that a common carrier who happens to be engaged both in interstate and intrastate commerce is liable for any negligent act by it resulting in injury to one of its employees engaged at the time in interstate employment. This unanimity is based on the terms of the statute which speaks of recovery for injury or death from the negligence "of *any* of the * * * employees" of a carrier engaged in interstate carrier as construed (so say the majority in the Pedersen case) by Second Employers' Liability Cases, 223 U. S. 1, 51, and before further alluding to this we look at the facts in the Pedersen case, and the holding that plaintiff was engaged in interstate commerce.

He was an ironworker employed in the alteration and repair of a bridge, and while carrying, by direction of his foreman, from a tool car to the bridge, some bolts or rivets to be used in such repair, he was run down and injured by an intrastate passenger train, of whose approach its engineer negligently failed to give any warning.

Mr. Justice Van Deventer, speaking for the majority, regarded the bridge as part of the track and the latter an instrumentality of interstate commerce and the work of keeping it in repair "so closely related to such commerce as to be in practice and contemplation a part of it." Cautiously he says: "Of course, we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

Fairly then it may be said that anything done by any employee to preserve instrumentalities devoted to and actually used in interstate commerce puts him under cover of the Federal act as to any negligent injury by any employee of the carrier owning such instrumentalities. Notwithstanding the latter only may be engaged in intrastate work he is called a "co-employee."

Mr. Justice Lamar, taking the view that the Federal Act meant to embrace only employees engaged in interstate *transportation*, because such transportation is the "commerce" the act speaks of, thought the work plaintiff was engaged in was not a part of "commerce," i. e., transportation, but merely was "an incident which preceded it."

This view seems not to be well differ-

entiated by Mr. Justice Van Deventer in distinguishing between construction and maintenance. That which is being constructed for interstate commerce may be as much devoted to a public purpose as that which is being maintained therefor. There may be a *locus poenitentiae*, so to speak, as well in the one case as in the other.

For example, suppose a bridge of a common carrier is almost entirely carried away by flood or several miles of its track is destroyed. The integrity of the instrumentality has ceased. The work of restoration might be reconstruction or repair. In either case he would have to redevote the instrumentality in its restored condition to interstate commerce. If employees in this kind of work are not engaged in interstate commerce, then the ruling by the majority must be confined to those employees who make simple or ordinary repairs arising out of wear and tear in the use of the instrumentalities of commerce. But the opinions hint at no such distinction as this.

Mr. Justice Lamar, deeming, however, that employees who assist in maintenance of these instrumentalities are ruled to be employees in interstate commerce, argues that the man who pays the repairer his wages and the bookkeeper who enters the payments in the accounts also are engaged in interstate commerce, "for they are all employed by the carrier and the work of each contributes to its success in hauling freight and passengers."

More closely related than such paymaster and bookkeeper would seem to be the employee who forged the rivets for the repair of this bridge. But, if he, why not every man in the round-house of the carrier, unless what he does is solely and only for an engine or a car exclusively used in intrastate transportation?

How far back may this relation extend? May a contractor for supplies in the way of equipment, such as girders or rails, be deemed an employee, so that when visiting the scene of supply he may recover for negligent injury by an employee of his principal? He may be there as an expert to determine what would be suitable for proper maintenance? We refrain here and invite our readers to indulge in supposition for themselves.

But we do wish to inquire why, if the theory of negligence productive of injury to an employee engaged in interstate commerce is actionable under the Federal Act, because "the security, expedition and efficiency of the commerce depends" upon his not being negligently injured, nobody under the sun may be mulcted for such an injury, so far as Congress is concerned, but his employer? Why should this employer's other employee, who may be as apart from interstate commerce as a trespasser on the commerce track, bring the common employer under the act?

It cannot be said that this is because the common employer is peculiarly bound not to interfere with interstate commerce, for it is an absolute duty that no one shall do this. Is such singling out a constitutional classification under the Federal Act as that is interpreted by the Pedersen decision? The logic of this decision would seem to be that Congress may forbid the running on an interstate track of exclusively intrastate trains, because this impairs, or may tend to impair, "the security, expedition and efficiency" of interstate commerce.

NOTES OF IMPORTANT DECISIONS

INDEMNITY INSURANCE—LIABILITY OF INDEMNITOR TO EMPLOYE FOR DECEIT IN PROCURING RELEASE OF INDEMNITEE.—Brown v. Ocean Accident & G. Corp., Ltd., of London, 140 N. W. 1112, decided by Supreme Court of Wisconsin, shows that indemnity company intervened to obtain a settlement of a cause of action in behalf of an employee of one of its indemnitees, taking up negotiations to this end, as alleged, on its own motion. It procured a release of its indemnitee upon certain representations alleged to have been false and fraudulent regarding the nature of the employee's injuries, specifically representing that they were not per-

manent, while the indemnitor well knew the contrary to be true and the employee relying on the truth of said representations in executing such release.

The employee brought suit, alleging the foregoing in an action against the company; facts constituting a cause of action against its indemnitor; that it was such; the company taking charge of plaintiff and removing him to and keeping him at a hospital and the indemnitee since becoming insolvent.

The trial court sustained a demurrer to the complaint for want of facts sufficient to constitute a cause of action, which ruling the Supreme Court reverses, one judge dissenting and another taking no part in the decision.

The court overruled the theory of the trial court that "the representations were nothing more than an expression of opinion as to what the future physical condition of the plaintiff would be," because the averments of the complaint showed that they were made by the agent of the company while plaintiff was at the hospital under the care and attendance of the company's physicians..

It was said: "A legitimate inference from the allegations is that the representations respecting the extent of plaintiff's injuries were made on the statements or by authority of the physicians in charge and therefore must be regarded as representations of existing facts, coming from persons supposed to have special knowledge on the subject and capable of stating acurately the extent of the plaintiff's injuries. It is therefore apparent that defendant knew or ought to have known, through its agents and servants, the extent of the plaintiff's injuries and the plaintiff had a right to rely upon such statements as coming from persons with knowledge."

While this is a sufficient reason for the distinction the court draws, it seems to us even milder than another equally sufficient reason. There was equal room for inference that a confidential relation between physician and patient had been violated for a fraudulent purpose, which violation is of such a nature as to justify both compensatory and punitive damages. We would have been delighted to see the court condemning in vigorous terms another injecting himself into that relation and incidentally whipping the physician over his shoulders. It would not be a far stretch in principle to say that this plaintiff had an action against those physicians, if they knew of the alleged representations and their purpose and, yet, remained silent.

SOME EXCEPTIONS TO THE RULE THAT COMMON CARRIERS CANNOT CONTRACT AGAINST THEIR OWN NEGLIGENCE.

The obligations of a common carrier, arise from the public nature of its employment, and in deciding the question as to the extent of such duties, such reason for the obligation must always be kept in view.

Being imposed by law, it is generally held to be against public policy to allow the obligations so imposed to be changed by a contract exempting the carrier from the consequences of negligence in the employment. But it is an elementary principle in the law of Contracts, that *"Modus et conventio vincunt legem"* (the form of agreement and the convention of parties override the law), and in the words of an eminent Judge, "It must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important functions of Courts of Justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligations on the pretext of public policy, unless it clearly appears that they contravene public right or the public welfare."

However, the above maxim is not of universal application and it is well settled that parties are permitted by contract to make a law for themselves, only, in cases where their agreements do not violate the express provisions of any law, nor injuriously effect the interests of the public.[1]

(1) Broom. Leg. Max. No. 543. In Cleveland, etc., R. Co. v. Curran, 19 Ohio St. 1, 2 Am. Rep. 362, the court says: "Carriers of the class of the plaintiff in error, are creatures of legislation, and derive all their powers and privileges by grant from the public. They are created to effect public purposes, as well as to subserve their own interest. They are intended, by the law of their creation, to afford increased facilities to the public for the carriage of persons and property, and, in performing this office, they assume the character of public agents, and impliedly undertake to employ in their business the necessary degree of skill and care. This obligation arises from the public nature of the employment, and is founded on the policy of the law for the protection of the persons and property of the public, which must of necessity be committed, to a very great ex-

This is in effect following the maxim, *"Conventio privatorum non potest publico juri derogari"* (An agreement of private persons cannot derogate from public right).

Viewing the above maxims as the foundations upon which the arguments in favor of, and against, the exemption of carriers liability, are built, the application to the special classes of such cases can only be seen by an examination of the leading ones. The cases may be divided into two classes for consideration. *First,* Passengers for hire. *Second,* Gratuitous passengers.

A common carrier primarily was a carrier for hire, for without the recompense of the carriage, it as a business would soon cease. The right to be carried was a common one, open to all, subject to reasonable rules.

Stock Drover Passes: It seems to be well settled that passes which purport to release the companies from damages through their negligence, issued in connection with bills of lading for the shipment of live stock, are void, being against public policy. These are known as "Stock Drovers' Passes" and allowed drovers to accompany their stock, the usual freight rates being paid for the transmission of the stock. The reasons advanced by the Courts are, that in such cases the shippers had paid for the transporation of their persons as well as their animals, when they paid the freight rate, that the transaction was an entirety, hence the railroad companies stood in the relation of common carriers for hire, and as such they could not abandon a duty owing to the general public.[2]

But it is recognized, however, in the leading cases of this nature, that a common carrier may, become a private carrier, or a bailee for hire, when as a matter of accommodation, or special engagement, he undertakes to carry something which it is not his business to carry.[3]

Circus Cases: Under this rule it has been held that a railroad company could enter into a written contract with a circus company, stipulating therein that the contract was not made with the company as carriers, either common or special, and that because of the inadequate consideration the railroad company was released from all liability in respect to the circus and menagerie, and from any loss or damage to persons or property, that might be carried under the contract, no matter how caused.[4] The Courts in sustaining contracts releasing railroad companies in "circus cases," have used the following reasons: *a.* Such company was under no common law obligation to move a circus company over its line in the manner it desired to be carried. *b.* As there was no common law or statutory obligation to render the service, then public policy would not forbid such rendition of service under any terms which the parties might stipulate. *c.* "Circus cases" are distinguishable from "express messenger cases" in the character of the service which the railway company undertakes to render. In the express cases the cars being owned by the railroad company, and in the circus

tent, to the care of public carriers. * * * It cannot be denied that pecuniary liability for negligence promotes care, and if public carriers in conducting their business can graduate their charges so as to discharge themselves from such liability, the direct effect will be to encourage negligence by diminishing the motives for diligence." Kneetle v. Newcomb, 22 N. Y. 249; Railroad Co. v. Lockwood, 17 Wall. 357.

(2) Railroad Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719; New York, C. R. Co. v. Lockwood, 17 Wall. 359, 21 L. ed. 634; M. R. Ry. Co. v. Tietken, 49 Neb. 130; Feldschneider v. R. R. Co., 122 Wis. 423; R. R. Co. v. Teeters, 166 Ind. 335, 5 L. R. A. 425; Shriggs, Adm'r v. R. R. Co., 77 Vt. 347; Weaver v. R. R. Co., 139 Mich. 590.

(3) New York C. R. Co. v. Lockwood, 17 Wall. 359, 21 L. ed. 634; Hutchinson on Carriers, 2nd Ed., Sec. 44; B. & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 44 L. Ed. 560, 20 Sup. Ct. Rep. 385; R. R. Co. v. Hamler, 215 Ill. 525, 1 L. R. A. (N. S.) 674.

(4) Kelly v. Grand Trunk Western Ry. Co., 93 N. E. (Ind.) 616; C. C. C. & St. L. Ry. Co. v. Henry, 170 Ind. 94, 83 N. E. 710; Clough v. Grand Trunk W. R. Co., 155 Fed. 81, and cases cited; Robertson v. Old Colony R. Co., 156 Mass. 525, 32 Am. St. Rep. 482, 31 N. E. 650; Chicago, M. & St. Paul R. Co. v. Wallace, 30 L. R. A. 161, 14 C. C. A. 257, 24 U. S. App. 589, 66 Fed. 506; but see Seaboard Air Line Co. v. Mann, 132 N. C. 445, 43 S. E. 930, where a stipulation to release railway company did not exempt that company from liability for a negligent injury to an employee of the circus company, but its effect was merely to indemnify the company in case it incurs liability to such employee.

cases the cars being owned by the show company. *d.* In such cases the servants of the railway company are the special servants of those who hired them. *e.* Such contract made between a circus and a railway company is binding upon a servant of the former company.

Somewhat similar cases are those involving contracts exempting railway companies from liability for negligent injury to sleeping-car or express company employees, or others sustaining a like relation to the company.

Express Messenger Cases: The *Voigt case*[5] is a leading Federal decision. In that case an express company had entered into a contract with a railway company to furnish it cars for the transaction of its express business, to be transported by its fast passenger trains, together with one or more persons in charge of express packages, known as express messengers, and for that purpose to be allowed to ride in the express cars. By the contract the express company agreed to protect the railroad company and hold it harmless from all liability it might be under to employees of the express company for any injury sustained by them while being so transported by the railroad company. Voigt was employed by the express company under a contract in writing, signed by him, whereby it was agreed between him and the express company that he assumed the risk of all accidents or injury he might sustain in the course of his employment, and agreed to indemnify and hold harmless the express company from any and all claims that might be made against it on his part for any damages sustained by him by reason of any injury resulting from the negligence of the railroad company, and to execute and deliver to the railroad company a release of all claims and demands and causes of action arising out of, or in any manner connected with, his employment by the express company, and expressly ratified the agreement between the railroad company and the express company. He entered into the contract freely and voluntarily, and obtained the benefit of it by securing his appointment as messenger. He was injured in a collision, and brought suit against the railroad company to recover damages.

The Court said: "The question we are asked to answer is whether William Voigt, the defendant in error, can avoid his agreement that the railroad company should not be responsible to him for injuries received while occupying an express car as a messenger in the manner and circumstances heretofore stated, by invoking that principle of public policy which has been held to forbid a common carrier of passengers, for hire, to contract against responsibility for negligence." After pointing out that the railroad company was under no obligation to enter into such contract with the express company, in the course of the opinion the court said: "It is evident that, by these agreements, there was created a very different relation between Voigt and the railway company than the usual one between passengers and railroad companies. Here there was no stress brought to bear on Voigt as a passenger desiring transportation from one point to another on the railroad. His occupation of the car, specially adopted to the uses of the express company, was not in pursuance of any contract directly between him and the railroad company, but was an incident of his permanent employment by the express company. He was on the train, not by virtue of any personal contract right, but because of a contract between the companies for the exclusive use of a car. His contract to relieve the companies from any liability to him or to each other for injuries he might receive in the course of his employment was deliberately entered into as a condition of securing his position as messenger. He was not asking to be carried from Cincinnati to St. Louis, but was occupying the express car as part of his regular employment, and as provided in a contract, which, as we have seen, the railroad company was

(5) Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 44 L. Ed. 560, 20 Sup. Ct. Rep. 385.

under no legal compulsion to enter into." As a result a recovery was denied to Voigt. Justice Harlan, however, dissented upon the ground that the holding was in conflict with the *Lockwood case* and the cases following it. He thought that the railroad company was liable, "upon the broad ground that defendant corporation could not, in any form, stipulate for exemption from responsibility for negligence of its servants or employees in the course of its business whereby injury comes to any person using its cars with its consent for the purpose of transportation."[6]

The doctrine of the *Voigt case* is followed by many of the Courts and is sustained by the decided weight of authority.[7] However, there is respectable authority holding the contrary. In most of these holdings, however, they rely upon some statutory provision denying the right of a common carrier to contract for relief from common law liability.

In the case of *Davis v. Chesapeake & O. R. Co.*,[8] the Kentucky Court held that a contract between an express messenger and an express company, and between the express company and the railroad company, to relieve the railroad company from liability for negligent injury to the express messenger, fell within the provision of the constitution of that state prohibiting a common carrier from relieving itself by contract from its common law liability. In a Virginia case[9] such a stipulation in a contract between an express messenger and an express company, was held to be invalid under the Code which provided that "no agreement made by a transportation company for exemption from liability for injury or loss occasioned by its own neglect or misconduct as a common carrier shall be valid." In deciding the case the Court repudiates the *Voigt case* and says that such case is a distinct exception to the general rule that a common carrier cannot exempt itself from liability for a negligent injury to passengers, and that such a holding is a deviation from the same court's former holding in the *Lockwood case*.

In the case of *O'Brien v. Chicago & N. W. R. Co.*,[10] it was held that an express messenger contract such as was sustained in the *Voigt case* would fall within the prohibition of Section 2091 of the Iowa Code. This section provided that railroad corporations should be liable to every person, including employees, for the consequences of the neglect or mismanagement of the company's servants, and that no contract which restricted such liability should be legal or binding.[11]

Sleeping Car Employees: One of the leading cases holding that a railroad company may contract for exemption from lia-

(6) The court in the controlling opinion in the Voigt case distinguishes that case from the Lockwood case and the cases following it. See Railway Co. v. Stevens, 95 U. S. 655; Liverpool Steam Co. v. Sampson, 129 U. S. 397.

(7) For cases following the Voigt case and which involve the injury to an express messenger, see Robinson v. St. Johnsbury & L. C. R. Co. (Vt.), 9 L. R. A. (N. S.) 1249, 66 Atl. 814; Long v. Lehigh Valley R. Co., 65 C. C. A. 354, 130 Fed. 870; Pittsburgh, C. C. & St. L. R. Co., 148 Ind. 196, 40 L. R. A. 101, 62 Am. St. Rep. 503, 46 N. E. 917, 47 N. E. 464; Peterson v. Chicago & N. W. R. Co., 119 Wis. 197, 100 Am. St. Rep. 870, 96 N. W. 532; Hosmer v. Old Colony R. Co., 156 Mass. 506, 31 N. E. 652; Kelly v. Malott, 67 C. C. A. 548, 135 Fed. 74; Blank v. Ills. C. R. Co., 182 Ill. 332, 55 N. E. 332; Note to Denver & Rio Grande R. R. Co. v. Whau (Colo.), 89 Pac. 39, 77 L. R. A. (N. S.) 432.

(8) Davis v. Chesapeake & O. R. Co., 29 Ky. L. Rep. 53, 5 L. R. A. (N. S.) 458, 92 S. W. 339.

(9) Shannon v. Chesapeake & O. R. Co., 104 Va. 645, 52 S. E. 376.

(10) O'Brien v. Chicago & N. W. R. Co., 116 Fed. 502: See also Starr v. Great Northern R. Co., 67 Minn. 18, 69 N. W. 632 to the same effect.

(11) See Mexican Nat. R. Co. v. Jackson, 55 C. C. A. 315, 118 Fed. 549, where a Texas statute was held to invalidate a contract concerning a sleeping car porter. Also Texas & P. R. Co. v. Fenwick, 34 Tex. Civ. App. 222, 78 S. W. 548; but see McDermon v. Southern P. Co., 122 Fed. 669, where a contract between a Pullman car porter and the Pullman Company, whereby the former assumed the risks of all accidents and casualties, released the Pullman Company from any claim for liability of any nature and ratified contracts between the Pullman Company and railroad companies, was held not to be within the Missouri statute providing that "no contract made between any railroad corporation and any of its agents or servants, based upon the contingency of the injury or death of any agent or servant, limiting the liability of such railroad corporation for any damages under the provisions of this act (fellow-servant law), shall be valid or binding; but all such contracts or agreements shall be null and void."

bility for negligent injuries to conductors in charge of the sleeping cars of other corporations attached to its trains, is that of *Denver & Rio Grande R. Co. v. Whau.*[12] In this case the employee of the sleeping car company was a conductor in charge of the car and he had entered into a contract with said company assuming the risk of all accidents and agreeing to indemnify that company against liability for all claims or sums of money that it might have to pay out to other companies on account of any injuries he might receive. The contract also contained a stipulation releasing the railroad company over whose lines the sleeping car would operate. In denying a recovery to the conductor for injuries the Supreme Court of Colorado, said, "Such contracts as we are considering are not against public policy, and may be enforced, because their conditions are in no sense injurious to the interests of the public. The plaintiff was not compelled to enter into the contract in order to obtain the rights of a passenger. He sought something more, whereby his relation, instead of passenger, was that of an employee of the Pullman Company, and he was upon the train solely for the purpose of transacting the business of his employer by virtue of the contracts pleaded. . . . The power of a common carrier to limit its liability for negligence should be confined to the narrowest possible limits; and perhaps no general rule can be formulated which would serve as a test in determining the validity of special contracts between carriers and others by which the former undertake to limit their liability in this respect. For these reasons, we do not wish to be understood as unqualifiedly assenting to the doctrine that, when a common carrier contracts to do something within the scope of its powers, but which by law it is not required to do, it may exempt itself from the consequences of negligence in the performance of such service. Each case must necessarily depend more or less upon its own circumstances. . . . As we have said, the plaintiff was not a passenger. He was upon the train for a particular purpose. He had no right to be there for that purpose except by and with the consent of the defendant, and hence it had the right to fix the terms upon which it would permit him to ride upon its train for that purpose. The *Voigt case* is cited and approved by the Court.

In sustaining a contract similar to the one in the *Whau case* the Supreme Court of Indiana says,[13] "In no sense was the appellee bound to accept the appellant upon its trains solely because he accompanied a palace car tendered by the Pullman company, for the obvious reason that the carrier was under no legal obligation to accept and haul the sleeping car itself. Counsel for appellant urged the argument that it is customary for sleeping cars to be attached to railway trains, thus affording a great convenience to travelers; and hence the carrier is not proceeding outside of its regular business in accepting such coaches. But counsel failed to distinguish between a departure from the legitimate business of a carrier, and the doing of an act which though within the general scope of its powers, is not imposed upon it as a duty. It would be no ground for an action of quo warranto against a railroad corporation that it was transporting circus cars, or express cars, over its lines, or that a street car company has received for carriage a bag of specie, but no one would seriously contend that these acts are such as the carrier must perform. He may perform them, but, if he refuse, he cannot be proceeded against as for a violation of his common law duty. If he does agree to perform them he may stipulate especially how far his liability for negligence shall extend."[14]

It has also been held that continued employment as a porter on a sleeping car was

(12) Denver & R. G. R. Co. v. Wahu, (Colo.) 89 Pac. 39, 11 L. R. A. (N. S.) 432.

(13) Russell v. Pittsburgh, C. C. & St. L. R. Co., 157 Ind. 305, 55 L. R. A. 253, 87 Am. St. Rep. 214, 61 N. E. 678; Peterson v. C. & N. W. R. Co., 119 Wis. 197, 100 Am. St. Rep. 879, 96 N. W. 532.

(14) See following sleeping car cases following the Whau case and citing with approval the

a sufficient consideration for the release from liability for personal injuries caused through the negligence of a railroad company hauling a car, although the contract was executed some time after he had entered the service of the sleeping car company.[15] and that the mere fact that a porter, of a Pullman car company did not read the contract by which he assumed all the risks of accident, and ratified contracts by which the Pullman company agreed to indemnify the railroad companies against liability to employees of the Pullman company, and agreed himself to indemnify the Pullman company against any liability to which it might be subject under such contracts, does not enable him to avoid such contract as a defense in his favor as against the railroad company.[16]

However, there is some difference of opinion on the question whether the employee of an express or sleeping car company, is chargeable with notice of a contract between his employer and the railroad company, protecting the latter against liability for injuries to the employees of the former.[17] And contracts of this nature should be strictly construed. As a New York Court tersely said, "Considerations based upon public policy and the nature of the carriers undertaking, influence the application of the rules, and forbid its operation, except where the carriers immunity from the consequences of negligence is read in the agreement *ipsissimis verbis*."[18]

Free Pass Cases: The last class of cases to be considered, are those, where the validity of contracts of exemption from liability from negligence, in free passes is involved. The passes are those for the carriage of passengers and not of freight. Here again we find a conflict of authority. Some of the Courts denying the legality of the contracts of exemption on the broad grounds that contracts of this nature are against public policy and void, without regard as to whether there was any consideration for the issuing of the pass or not.[19] Others hold the contracts void where there is a consideration shown, holding that the relation is the same as between the carrier and a paid passenger, and hence such contracts are forbidden.[20] Then we find a long line of cases holding that where the carriage of the passenger is gratuitous then a stipulation on the pass exempting the company from liability for negligence is legal and binding upon the person so carried.

In the case of *Northern Pacific Railway Co. v. Adams*,[21] this last principle received the sanction of the Supreme Court of the United States. In that case plaintiffs intestate was an attorney for several railway companies, but was not in the employ of the defendant, and lost his life while riding on a pass on the Northern Pacific road. It was conditioned that the person accepting the pass agreed to non-liability on ac-

Voigt case: McDermon v. Southern P. Co., 122 Fed. 669; Chicago, R. I. & P. R. Co. v. Hamler, 215 Ill. 525, 1 L. R. A. (N. S.) 674, 106 Am. St. Rep. 187, 74 N. E. 705; Shaver v. Penn. Co., 71 Fed. 931; Coup v. Wabash, St. L. & P. R. Co., 56 Mich. 111, 56 Am. Rep. 374, 22 N. W. 215. See Griswold v. New York & N. E. R. Co., 53 Conn. 371, 55 Am. Rep. 115, 4 Atl. 261, where stipulation was upheld in a contract with a restaurant boy selling sandwiches on the train. Contra, see Starr v. Great Northern R. R. Co., 67 Minn. 18, 69 N. W. 632.

(15) Chicago, R. I. & P. R. Co. v. Hamler, 215 Ill. 525, 1 L. R. A. (N. S.) 674, 106 Am. St. Rep. 187, 74 N. E. 705.

(16) New York C. & H. R. R. Co. v. Difendaffer, 62 C. C. A. 1, 125 Fed. 893. See also Long v. Lehigh Valley R. Co., 65 C. C. A. 354, 130 Fed. 870.

(17) See on this subject, Brewer v. New York, L. E. & W. R. Co., 124 N. Y. 59, 11 L. R. A. 483, 21 Am. St. Rep. 647, 26 N. E. 324; Chamberlain v. Pierson, 31 C. C. A. 157, 59 U. S. App. 55, 87 Fed. 420. See case of Kenney v. New York C. & H. R. R. Co., 125 N. Y. 422, 26 N. E. 626, where an exemption contract was held not to cover liability for injuries negligently caused.

(18) Kenney v. New York C. & H. R. R. Co., 125 N. Y. 422, 26 N. E. 626.

(19) Bryan v. Mo. Pac. Ry. Co., 32 Mo. App. 228 and cases cited. Approved in Huckstep v. St. Louis & H. Ry. Co. (Mo.), 148 S. W. 988. See cases cited in dissenting opinion in Northern Pac. R. Co. v. Adams, 192 U. S. 440; Railway Co. v. McGown, 65 Tex. 643.

(20) Railway Co. v. Stevens, 95 U. S. 655; Nickles v. Seaboard Air Line Ry., 74 S. C. 102, 54 S. E. 255; Williams v. R. R. Co., 18 Utah 210.

(21) Northern Pac. Ry. Co. v. Adams, 192 U. S. 400, dissenting opinion by two judges See later case of Boering v. Chesapeake Beach Ry. Co., 193 U S. 442, 48 L. Ed. 742, following the Adams case.

count of negligence. In holding the condition valid, Mr. Justice Brewer said, "The question is distinctly presented whether a railroad company is liable in damages to a person injured, through the negligence of its employes, who at the time is riding on a pass given as a gratuity and upon the condition known to and accepted by him that it shall not be responsible." The court holds that the *Voigt case* is decisive on the question as to whether such contracts can be made by common carriers. It further said: "The railway company was not as to Adams a carrier for hire. It waived its right as a common carrier to exact compensation. It offered him the privilege of riding in its coaches without charge if he would assume the risks of negligence. He was not in the power of the company and obliged to accept its terms. They stood on an equal footing. If he had decided to hold it to its common law obligations to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. . . . So far as the element of contract controls, it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make and no public policy was violated."

In an Indiana case[22] the appellant paid no fare, and was traveling on a free pass, which was issued to him as a pure gratuity, and which contained a stipulation, agreed to by appellant, that "by its acceptance and use any and all claims for injuries to person or for loss or damage to baggage that might accrue to (appellant) are released." In an action for injuries while riding under the above conditions the above facts were held by the lower Court to constitute a valid defense to the action. The appellant refused to plead further and judgment was rendered, from which an appeal was taken. In affirming the case Mr. Justice Baker said: "Appellant is prosecuting this action in the face of his agreement not to do so. No allegations appearing to the contrary, presumably he was of sufficient capacity to make a binding contract. His contention, therefore, is that no one can lawfully make such a contract and be bound thereby. One who seeks to put a restraint upon the freedom of contracts must make it plainly and obviously clear that the contract in question is void." After stating that a common carrier cannot by contract with their customers, exempt themselves from the consequences of their own negligence, and giving the reasons for said rule, the Court refers to the cases holding that exemption contracts with express messengers and sleeping car employees are valid, it then says: "If express messengers and Pullman porters, who are on the trains in pursuance of their regular vocations and whose transportation is paid for, cannot require railroad companies to carry them as a public duty, much less can holders of gratuitous passes. They are creatures of favoritism! They voluntarily separate themeselves from the general public. They do not approach the companies as part of the general public, to be carried on the usual terms of service and compensation, and they are certainly under no compulsion to enter into the contract of exemption. The reasons on which is based the rule that public carriers will not be permitted to evade a public duty wholly fail, for railroad companies are under no obligation to transport the general public gratuitously.

Not only is no principle of public policy subverted by denying the holder of a free pass the right to repudiate his contract, but there is sound public policy in holding him to it. The expenses of operating railroads are borne by the general public—that is, by the patrons who pay. In so far as persons stand aloof from the general public they increase the burden or at least postpone the day of lower rates. If the pass takers, in addition, were allowed to recover judgments for personal injuries by disavowing their agreements, they would be making a positive increase of disbursements, to be borne ultimately by the general public."[23]

(22) Payne v. Terre Haute & Indianapolis Railway Co., 157 Ind. 616, 56 L. R. A. 472.

(23) See upon validity of exemption clauses on free passes. Griswold v. New York, etc., R. Co., 53 Conn. 371, 55 Am. Rep. 115, 26 Am. & Eng. R. Cas. 280; Rogers v. Kennebec, etc., Co., 86 Me. 261, 29 Atl. 1069, 25 L. R. A. 491; Quimby v. Boston, etc., R. Co., 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846, 40 Am. & Eng. R. Cas. 693; Kinney v. Central R. Co., 34 N. J. L. 513, 3 Am. Rep. 265; Wells v. New York, etc., R. Co., 24 N. Y. 181; Muldoon v. Seattle City R. Co., 7 Wash. 528, 35 Pac. 422, 22 L. R. A. 794, 38 Am. St. 901, 58 Am. & Eng. R. Cas. 546; Muldoon v. Seattle, etc., R. Co., 10 Wash. 311, 45 Am. St. 787.

It would seem to the writer that the question as to whether the passage was gratuitous or not, was of vital importance in cases of this nature. If there is a consideration for the passage, no matter of what kind, then there would be no escape from the doctrine that a carrier cannot bargain away his liability for negligence with a customer.

But if no consideration is paid, then an exemption contract is legal and binding upon the one making it. Employment is a good consideration for a pass and so on the rulings above set out, a stipulation on an employee's pass would not be good if the employe was injured on the road for which he was working. It is doubtful whether this rule would be applied, however, to the families of employees, unless there was a promise to furnish such passes in the contract of employment. Such promises would not seem to be an implied one.

SUMNER KENNER.

Huntington, Indiana.

HOMICIDE—MANSLAUGHTER

STATE v. TROLINGER.

Supreme Court of North Caronlia. April 16, 1913.

77 S. E. 957.

Where defendant while handling a pistol caused it to be discharged and killed deceased with whom defendant was on friendly terms, his act in unlawfully carrying the pistol concealed, being merely malum prohibitum, and not necessarily tending to bring about the result that happened, was insufficient in itself, unless accompanied with negligence or further wrong to render defendant guilty of manslaughter, on the ground that he killed deceased while engaged in an unlawful act.

The testimony on the part of the state tended to show that on January 18, 1913, Nash Lane was killed by a discharge of a pistol in the hands of the prisoner and under circumstances as follows: Bob Tarpley for the state testified: "That he was five to ten feet behind a group of persons, seven in number, in which were included the deceased and the defendant. The he heard the crowd talking and laughing. Heard a pistol shot, and heard a person named Trolinger (not defendant) say, 'You shot that boy,' and heard defendant say, 'I never shot the boy.' That he caught up with the crowd and found Nash Lane shot. Did not see pistol. Heard no fuss of any kind and heard only talking and laughing." William Crawford, another witness for state, testified: "That he was walking in front of the group referred to. That he never saw pistol, but heard it fire, and heard someone exclaim, 'You shot that boy.' That there had been no fuss of any kind. The crowd was laughing and talking." John Ed McBroom for the state testified: "That he was in the group, walking next to defendant. That he and defendant were going home, and the others in group were going to a store. That they were in public road, and that defendant had a pistol 'fooling with it, and it went off.' That the defendant 'had it out, messing with it, pulling the cartridges out.' That the defendant had had the pistol in his hands three or four minutes before it fired. That deceased was on the left side of road. That there was not a fuss at all. Not a cross word." Defendant introduced no testimony. The court in effect charged the jury that if they were satisfied beyond reasonable doubt that the prisoner killed deceased with a deadly weapon, the burden was on the defendant to show it was excusable homicide, and there was no evidence in case sufficient to go to the jury to show that defendant was not guilty of the crime of manslaughter, and it would be their duty to convict of that crime. Verdict, guilty of manslaughter. Judgment, and prisoner excepted and appealed.

HOKE, J. (1) On the facts as they now appear of record, this case, in our opinion, is controlled by that of State v. Limerick, reported in 146 N. C. 649, 61 S. E. 568. In Limerick's case the only eyewitness of the homicide testified, in effect: That deceased and defendant prisoner, two young boys, good friends, were coming through a field and deceased had a gun. That witness heard one say to the other, "I will shoot you," the other replied, "No, I will shoot you," they were laughing. Witness turned around, and as he did so the gun fired and deceased fell. That prisoner held the gun when it fired. They were standing close together and about 18 steps from witness. Did not know which one had the gun when they walked off from witness. Did not know which one had it when they were talking about shooting each other. On cross-examination, the witness further said: "The deceased and prisoner seemed to be great friends. That witness was hunting and came up with them. They seemed to be laughing," etc. This was the only witness who tes-

tified directly to the facts of the occurrence, and the court below ruled, as in this case, that in any aspect of the evidence the prisoner was at least guilty of the crime of manslaughter. Speaking of this position, the Supreme Court in granting a new trial said: "Undoubtedly, if the prisoner intentionally pointed the gun at the deceased and it was then discharged, inflicting the wound of which he died, or if the prisoner was at the time guilty of culpable negligence in the way he handled and dealt with the gun, and by reason of such negligence the gun was discharged, causing the death of deceased, in either event the prisoner would be guilty of manslaughter, and this whether the discharge of the gun was intentional or accidental. We have so held at the present term, in State v. Stitt (146 N. C. 643, 61 S. E. 566, 17 L. R. A. [N. S.] 308), and other authorities are to like effect. State v. Turnage, 138 N. C. 566 (49 S. E. 913); Commonwealth v. Matbthews, 89 Ky. 293 (12 S. W. 333). But neither of these positions necessarily or as a matter of law arises from the testimony, and the question of the prisoner's guilt or innocence must be left for the jury to determine on the facts as they shall find them. State v. Turnage, supra."

In the present case, there is no evidence that the parties were angry with each other. It is not admitted, nor has it thus far been established, that the prisoner intentionally pointed the pistol towards the deceased, and the testimony as now given in seems to present the prisoner's case on the question wnether he was guilty of culpable negligence in the way he was handling the weapon at the time of its discharge, negligence of a kind not unlikely to cause injury to the deceased or any of the bystanders and a proper application of the principles announced in Limerick's case require that the issue be submitted to the jury as to defendant's guilt or innocence of the crime of manslaughter. See State v. Turnage, 138 N. C. 566, 49 S. E. 913.

We were referred by counsel to case of State v. Stitt, 146 N. C. 643, 61 S. E. 566, 17 L. R. A. (N. S.) 308, as an authority sustaining the charge; but in that case the facts showed that the prisoner intentionally pointed the gun at the deceased with some evidence that he snapped it, an act not only of the highest negligence but in breach of the statute laws making prisoner's act an unlawful assault on the person.

(2) It was further urged that the prisoner at the time was engaged in an unlawful act, to wit, carrying concealed weapons when not on his own premises. This is not conclusively established by the evidence, and if it were the defendant's guilt would not follow as a matter of law; the unlawful act being only malum prohibitum, and the act itself unless accompanied with negligence or further wrong having no necessary tendency to bring about the result.

In Horton's case, 139 N. C. 591, 51 S. E. 945, 1 L. R. A. (N. S.) 991, 111 Am. St. Rep. 818, 4 Ann. Cas. 797, the following citation was made with approval from Foster's Crown Law: "A. shooteth at the poultry of B. and by accident killeth a man; if his intention was to steal the poultry, which must be collected from circumstances, it will be murder by reason of that felonious intent, but if it was done wantonly and without that intention, it will be barely manslaughter. The rule I have laid down supposeth that the act from which death ensued was malum in se. For if it was barely malum prohibitum, as shooting at game by a person not qualified by statute law to keep or use a gun for that purpose, the case of a person so offending will fall under the same rule as that of a qualified man. For the statutes prohibiting the destruction of the game under certain penalties will not, in a question of this kind, enhance the accident beyond its intrinsic moment." And this principle is fully sustained in Potter v. State, 162 Ind 213, 70 N. E. 129, 64 L. R. A. 942, 102 Am. St. Rep. 198, 1 Ann Cas. 32, and other cases of like purport.

There is error, and the prisoner is entitled to have his cause tried before another jury.

New trial.

NOTE.—*Accidental Killing Resulting From Commission of a Misdemeanor.*—The cases which follow seem to show that if the misdemeanor, in the commission of which a killing accidentally results is one that is forbidden with the purpose to protect life, then it has such relation to the result as prevents the homicide from being a mere misadventure not punishable by law, except that even then the misdemeanor must be such as might naturally or reasonably bring about a particular killing.

In Irvin v. State, 9 Ga. App. 865, 72 S. E. 440, the state's evidence shows that defendant having a pistol in his hands from which he believed all the cartridges had just been shot out began a playful scuffle with a young girl. During this scuffle he playfully pointed the pistol at her, snapping it several times, until reaching a loaded cartridge. The pistol was discharged, killing her almost instantly. The girl called out: "Oh! Len, you have shot me," and he exclaimed: "Oh! I would not have shot you for anything in the world." Witnesses for accused and he said the pistol was discharged accidentally while the two

were in playful struggle for its possession. The jury found defendant guilty of involuntary manslaughter in the commission of an unlawful act and this was affirmed, the court saying one version constituted this offense while the other would make an accidental killing by misadventure. The unlawful act was in violation of a statute which said that "any person who shall intentionally point or aim a gun or pistol, whether loaded or unloaded, at another not in a sham battle by the military and not in self defense, etc., shall be guilty of a misdemeanor." The court thought "the very purpose of the statute is to protect life and limb from the reckless, careless pointing of guns and pistols at another." But exactly the same reasoning could have been indulged in in the instant case and the fact that the Georgia statute puts loaded and unloaded pistols in the same category makes it greatly resemble a statute against carrying concealed weapons, and there is the same argument about *malum prohibitum* as that made in the instant case. Also mere pointing would be no more than carrying. The fact of there being a homicide from culpable negligence is another question about which the Georgia case does not speak. Under that it might not be conclusively said the defendant should have gone free on his own testimony, for it might be deemed culpable negligence to have engaged in a playful struggle with deceased over the possession of a pistol.

In North Carolina the statute makes it a misdemeanor to point a gun or pistol at another "in fun or otherwise, and whether the gun or pistol be loaded or unloaded." This character of statute was said to create "an act importing negligence," and negligence is a ground for predicating a finding of manslaughter. State v. Stitt, 146 N. C. 643, 61 S. E. 566, 17 L. R. A. (N. S.) 308.

In Potter v. State, 162 Ind. 213, 70 N. E. 129, 64 L. R. A. 942, 102 Am. St. Rep. 198, the killing resulted from deceased struggling with defendant playfully and the latter's pistol carried unlawfully being caused to be discharged accidentally. The court said: "It is undoubtedly true, as a general rule of law, that a person engaged in the commission of an unlawful act is legally responsible for all of the consequences which may naturally or necessarily flow or result from such unlawful act. But before this principle can have any application under the facts in the case at bar, it must appear that the homicide was the natural or necessary result of the act of appellant in carrying the revolver in violation of the statute." Then the court argues that, if one engaged in hunting in violation of the statute accidentally discharged the pistol and killed another it could not "in reason be asserted that death was due to the unlawful act of hunting on Sunday." This comes very closely to being in square opposition to the Georgia ruling. Bishop New Cr. Law, § 332, is quoted as saying: "It is *malum prohibitum* and not *malum in se* for an unauthorized person to kill game in England contrary to the statutes, and, if in unlawfully shooting at game, he accidentally kills a man, it is no more criminal in him than if he were authorized."

Horton's Case, 139 N. C. 591, 51 S. E. 945, 1 L. R. A. (N. S.) 991, 111 Am. St. Rep. 818, 4 Ann. Cas. 797, referred to in the instant case concerned an accidental killing by one engaged in the violation of a statute making it a misdemeanor to hunt on another's property without a permit, but it was said this statute was not designed to protect human life but to prevent and suppress petty trespasses and annoyances.

In Robbins v. State, 8 Ohio St. 138, death by discharge of a pistol unlawfully carried by defendant, as the result of a friendly scuffle, was held not to make a case of homicide caused by the performance of an unlawful act.

However, decision has been quite one way as to its being manslaughter when a pistol is pointed at another in sport or play, if it is recklessly or negligently done and it would seem to need no statute for such a conclusion, though the existence of a specifically forbidding statute may help in characterizing the act of intentionally pointing as being reckless or culpably negligent. Among the cases thus holding are State v. Tippet, 94 Iowa 646, 63 N. W. 445; State v. Morrison, 104 Mo. 638, 16 S. W. 942; Murphy v. Com., 19 Ky. Law Rep. 215, 22 S. W. 649.

C.

CORRESPONDENCE.

RECALL OF JUDGES—SPECIAL TRIBUNAL FOR RECALL.

Editor Central Law Journal:

Enclosed herewith I hand you copy of a bill proposing an amendment to our State Constitution for the removal of judges, designed to take the place of the recall of judges in all cases except where the judge is recalled on some charge of a purely political nature. I invite your attention to the idea contained in the bill.

As I understand it, the recall may be used to remove officials, including judges, for two general classes of reasons, one relating to what might be called political delinquency or failure of an official to vote or act in sympathy with the political sentiment of his constituency; the other would relate more particularly to some personal delinquency on the part of the official, such as misconduct or mental or physical infirmity. Misconduct of any nature, including criminal, or infirmity of any kind, could be defined by law and made the subject of charges of a criminal or quasi criminal character. While it is, undoubtedly, the peculiar province of an electorate to recall an official for want of sympathy with the political sentiment of his constituency, where the official is accused of misconduct of any kind, it would seem to appeal to the ordinary sense of fairness that there be a tribunal of some kind where a proper and fair trial could be had as to the facts. This is entirely lacking in the popular recall. Where a judge is accused of corruption or other personal misconduct, there should be a tribunal before which he could be tried rather than to have the verdict of an electorate depending wholly upon ex parte and unsworn statements. The necessity for this is just as great in the case of guilt as in the case of innocence. In the ordinary recall a guilty man can make an ex parte statement and conceal his guilt a great

deal better than he could if he were subject to cross examination, as he would be upon trial in case he made any statement or testified in his own behalf.

This proposed amendment does not foreclose or interfere with the right of the people to recall a judge even after acquittal. After a trial in such a court, if the accused were acquitted and the testimony taken upon the trial should convince the people that the judge was either incompetent, corrupt or otherwise undesirable, he could still be recalled, the advantage being that the facts constituting the supposed disqualification would be a matter of record and backed up by sworn testimony. The great advantage would be in the superiority of the machinery of a court to ascertain the exact facts by means of witnesses subject to cross examination.

I should be pleased to hear from you in reference to the above.

Yours very truly,
GEO. W. PEACHEY.

St. Paul, Minn.

Note.—The following is the bill referred to above and which contains a very interesting suggestion to say the least:

"Section 1. The following amendment of Section 1 of Article 6 of the Constitution of the State of Minnesota, is hereby proposed to the people of the State of Minnesota for their approval or rejection, that is to say: Said Section 1 of said Article 6 shall be amended so as to read as follows:

"Section 1. The judicial power of the State shall be vested in a supreme court, district court, courts of probate, justices of the peace, and such other courts, inferior to the supreme court, as the legislature may from time to time establish by a two-thirds vote. The legislature shall have power by majority vote to establish and provide for a court for the recall and removal of judges, to consist of such number of persons elected or appointed, or constituted in such manner as may be provided by law. Said court shall have jurisdiction to recall and remove from office any judge of any court of this state for any cause for which impeachment would lie, or for incompetency, misconduct or any cause of recall or removal which may be provided by law. The tenure of office, manner of election, selection or appointment of the members of said court, its officials and procedure, shall be as provided by law. Nothing herein shall impair the jurisdiction of the legislature to impeach any judge nor to prevent the recall or removal of any judge by other lawful means."

BOOKS RECEIVED.

The American Annotated Cases containing the cases of general value and authority subsequent to those contained in American Decisions, American Reports and the American State Reports. Thoroughly Annotated Volume Ann. Cas. 1913. B. Price $5.00. San Francisco and Northport, L. I., N. Y. Bancroft-Whitney and Edward Thompson Co. Review will follow.

BOOK REVIEWS.

SUUMMARY OF LAWS RELATING TO COMMITMENT AND CARE OF INSANE IN UNITED STATES.

The National Committee for Mental Hygiene, with its offices at 50 Union Square, New York, has caused to be prepared and published summaries of the statutes of all of the states and District of Columbia for the care and commitment of the insane. These summaries are prosented in such a way that it is easy to ascertain what is being attempted through legislation in regard to the insane. It appears therefrom that some of the states are greatly in advance of others and that there is such diversity among them as to evidence that the subject has not generally received the careful attention its importance demands. The compilation is useful towards securing an intelligent treatment of what is a reproach to Christian humanity for it to be neglected.

The publication is in paper cover and by the committee from its office at 50 Union Square, New York, 1912.

HUMOR OF THE LAW.

J. Van Vechten Olcott of New York, tells the story of how Rufus Choate got from a witness the finest definition ever heard of absent-mindedness.

"What do you think is absent-mindedness?" asked Choate, who was putting the witness through a hot cross-examination.

"Well," replied the witness in a slow, deliberate tone, "if a man who thought he had left his watch at home, took it out of his pocket to see if he had time to go back and get it, I would call him a leetle absent-minded."

"In Cork," says O'Connell, "I remember a supernumerary crier, who had been put in the place of an invalid, trying to disperse the crowd by exclaiming with a stentorian voice: 'All you blackguards that isn't lawyers, lave the presince of the court entirely, or I'll make ye, by the powers'."

John is seven and the son of a lawyer. The father is much given to making fine distinctions in evidence, and the boy had often heard his father discuss the technical difference between absolute lying, misstatements of fact and the like.

The youngster had been caught in some boyish misdeed, and for once, in a way, though ordinarily a truthful lad, he attempted to smooth matters over.

"Son, look me straight in the eye and tell me if that statement is the truth," said the father, severely.

"Well, dad, I think that was a misstatement of fact," replied the boy. "It would have been a lie if I had expected you to believe it, but I didn't have much hope."

The father will be more careful in the future how he discusses abstract subjects around the house.—Exchange.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Bailment**—Due Care.—Where a designer of wall paper desiring to submit designs to a wall paper manufacturing concern left the designs in a room on the promise of the officers to look at them, the concern was only required to take the care in the protection of the designs that a reasonable man would take of his own property.—Gottlieb v. Wallace Wall Paper Co., 140 N. Y. Supp. 1032.

2. **Bankruptcy**—Corporation.—On purchase of shares of its own, outstanding stock by a corporation and payment therefor without diminishing capital stock, resulting in injury to creditors, held its trustee in bankruptcy could recover the payments.—Union Trust & Savings Bank v. Amery, Wash., 131 Pac. 199.

3.——Practice.—A discharge in bankruptcy, secured by a judgment debtor without notice to an attorney, who had filed a lien against the judgment for his fee, no mention of the lien having been made in the schedule of debts, did not discharge the attorney's interest in the judgment or bar his right to use the judgment to collect his lien.—Lown v. Casselman, N. D., 141 N. W. 73.

4.——Practice.—In order to establish the second act of bankruptcy under Bankruptcy Act July 1, 1898, it is not important to inquire what the debtor did or intended; the debtor's act only being material, while the third act of bankruptcy may be proved without showing that the debtor ever did or tried to do anything.—In re Truitt, U. S. D. C., 203 Fed. 550.

5.——Practice.—Where an issue was raised between a bankrupt's trustee and his landlord as to the ownership of certain machinery placed on the rented premises, she waived her right to have such issue determined in a plenary suit by appearing without objection and submitting the question to a master and the bankruptcy court.—In re Howard Laundry Co., C. C. A., 203 Fed. 445.

6.——Practice.—The general rule that a receiver may not employ the solicitor of either party to the suit in which he is appointed applies to trustees, but it is only when the trustee is acting adversely to one of the parties that there is any impropriety in his employing the counsel of the other.—In re Smith, C. C. A., 203 Fed. 369.

7.——Practice.—Act Cong. March 3, 1893, requiring sales of land to be made on the property or at the courthouse in the county where the land lies, does not apply to bankruptcy proceedings.—In re Britannia Mining Co., C. C. A., 203 Fed. 450.

8.——Priority.—Payments received by the president and manager of a bankrupt hotel company or money loaned to it to pay taxes, etc., while insolvent, held preferences, which were recoverable, and which precluded proof of the balance of the debt until returned.—Cooper v. Miller, C. C. A., 203 Fed. 383.

9.——Priority.—The fact that the manager of a bankrupt branch store also did certain menial and clerical work, such as selling goods, keeping accounts, and keeping the store clean, did not entitle him to a preference for unpaid salary as a "workman, clerk, or servant."—In re Greenberger, U. S. D. C., 203 Fed. 583.

10.——Provable Debt.—A landlord's claim for prior payment of rent for an unexpired term by his bankrupt tenant, in accordance with a clause in a lease which was valid under the laws of Pennsylvania, being a claim provable in bankruptcy, was a "debt owing to any person," which by the laws of the state was entitled to priority, and was therefore entitled to priority under Bankr. Act.—In re Keith-Gara Co., U. S. D. C., 203 Fed. 585.

11.——Res Judicata.—The presentation of a claim against a bankrupt to the trustee in bankruptcy does not prevent an action thereon against the bankrupt, where the claim was stricken out.—Graves v. Neosho Falls Bank, Kan., 131 Pac. 146.

12.——Set-Off.—Bankr. Act providing for setoffs, does not apply in case of a creditor of a bankrupt corporation, who is also a stockholder and indebted to the corporation on an unpaid stock subscription.—Kiskadden v. Steinle, C. C. A., 203 Fed. 375.

13. **Bills and Notes**—Estoppel.—Where purchaser of standing timber who had given note in settlement sent payments to be credited on the timber contract, this was not such a repudiation of the note that the acceptance of the payments estopped the seller to rely on the note.—Blanks v. Lephiew, La., 61 So. 615.

14.——Evidence.—Where the purchaser of personalty gave several notes for the price, which were transferred to different persons, the record of a pending suit on one is irrele-

vant in an action by another plaintiff on another.—Park v. Zellars, Ga., 77 S. E. 922.

15.——Negotiability.—A clause in a note, whereby indorsers and guarantors waive presentment and protest and consent that time of payment may be extended without notice, does not render it nonnegotiable.—De Groat v. Focht, Okla., 131 Pac. 172.

16.——Negotiability.—An instrument payable on a contingency is not negotiable, and the happening of the event does not cure the defect, and the right given to the holder of a note to call for additional securities, and thereby cause the instrument to mature, renders it nonnegotiable.—Hibernia Bank & Trust Co. v. Dresser, La., 61 So. 561.

17.——Pleading.—In an action upon a negotiable instrument, it is unnecessary to allege any consideration in the complaint, as a consideration is presumed.—Kenison v. Campbell, Cal., 131 Pac. 89.

18. **Brokers**—Implied Contract.—Where the vendor refused to perform after the broker had procured a purchaser, ready, willing, and able to buy at a price of $1 per acre more than the vendor asked, the broker was entitled to recover from him $1 per acre under an implied contract that his commissions should be any amount secured above the vendor's price.—Jones v. Hedstrom, Kan., 131 Pac. 145.

19.——Statute of Frauds.—An oral agreement by a broker to pay part of the commissions on a sale of land to another broker who procured the purchaser was not within the statute of frauds.—Johnston v. Porter, Cal., 131 Pac. 69.

20. **Carriers of Goods** — Damages. —Where one of plaintiff's horses was so injured during transportation that it died shortly after arriving at destination, plaintiff was entitled to recover as a part of his damages the amount expended in treating the horse, and also for removing its carcass.—Ft. Worth & D. C. Ry. Co. v. Jordan, Tex., 155 S. W. 676.

21. **Carriers of Passengers**—Alighting.—Where the car was started while a crippled passenger was alighting in the conductor's presence and view, the company would be liable for resulting injuries, though such passenger had already been allowed a reasonable time for alighting when she started to alight.—Mitchell v. Des Moines City Ry. Co., Iowa, 141 N. W. 43.

22.——Duty of.—Where a telegraph pole is in such dangerous proximity to a street car track as to constitute it a menace to the safety of a passenger, whom the company, owing to want of space inside, permits to stand on the footboard, the moving of the car without properly warning him is culpable negligence.—Previsich v. Butte Electric Ry Co., Mont., 131 Pac. 25.

23.——Relation.—A person climbing on the back bumper of a crowded summer street car and riding thereon is not a passenger, unless the evidence shows an acceptance of him as such.—Coyne v. Pittsburgh Rys. Co., Pa., 86 Atl. 524.

24.——Res Ipsa Loquitur.—While a presumption of negligence arises from proof of injury to a passenger, through any agency or instrumentality of the carrier, there is no presumption of willfulness or wantonness from that fact.—Moore v. Greenville Traction Co., S. C., 77 S. E. 928.

25. **Charities**—Cy Pres.—"Cy pres" is the doctrine of approximation in charitable trusts whereby the intent of a testator or grantor, which is impossible or impracticable literally, is carried out as near as possible.—Mott v. Morris, Mo., 155 S. W. 434.

26. **Commerce**—Peddling.—The business and occupation of peddling goods manufactured in another state, carried on wholly within this state, may be regulated by the state, if the statute does not discriminate between products of residents and nonresidents.—Shed v. State, Tex., 155 S. W. 524.

27. **Contracts**—Abandonment.—That a contractor to clear land entered into a subcontract with another to complete the work was not an abandonment of the contract.—Spina v. Arcadia Orchards Co., Wash., 131 Pac. 218.

28.——Ambiguity.—The provisions necessary to effectuate the purpose of an ambiguous or incomplete contract may be implied, but not when the contract is complete and definite and no fraud or other illegal or inequitable conduct is shown.—Pine Lumber Co. v. Crystal River Lumber Co., Fla., 61 So. 576.

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89.——Services.—In an action for services under an express contract to pay a certain monthly salary, interest should be allowed on each payment as it fell due.—Allen v. Central Counties Land Co., Cal., 131 Pac. 78.

90.——Warning.—A master, operating a picking machine to tear into shreds old bagging and rope in its factory, held negligent in directing an inexperienced employee to take the material from the machine with his hands, without warning him of the danger.—American Mfg. Co. v. Maslanka, C. C. A., 203 Fed. 465.

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